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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re the Marriage of NANCY DOW  
MOODY and PETER D. MOODY.**

**NANCY DOW MOODY,**

**Appellant,**

**v.**

**PETER D. MOODY,**

**Respondent.**

**A123034**

**(Marin County  
Super. Ct. No. FL020718)**

Nancy Dow Moody (wife) appeals from an order requiring her to pay \$15,000 in pendent lite attorney fees to husband Peter Moody (husband) so that he could oppose her appeal of an earlier fee award. Her primary claim is that the trial court abused its discretion because it did not consider her own expenses and financial hardships when making the order based on husband's purported need under Family Code section 2030.<sup>1</sup> We affirm.

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<sup>1</sup> Further statutory references are to the Family Code unless otherwise indicated.

## I. BACKGROUND

The instant matter is a dissolution proceeding that culminated—almost—in a stipulated settlement. Although the terms of the settlement were recited on the record in open court in June 2007, several months passed without the filing of a written judgment. In December 2007, husband filed a motion to enforce the judgment under Code of Civil Procedure section 664.6, at which time the parties disputed which of them had been responsible for the delay. Concluding that neither side’s proposed judgment completely and accurately represented the agreed-upon terms, but that wife had unreasonably delayed the process, the trial court prepared and entered its own version of the judgment and ordered wife to pay husband \$10,000 in attorney fees pursuant to sections 271 (sanctions) and 2030 (need-based fees).

Wife sought reconsideration of the attorney fee order, and, when her motion was denied, filed an appeal. She argued in her opening brief that an award of need-based fees under section 2030 was unsupported by the evidence, barred by the stipulated settlement agreement and unreasonable in amount. We affirmed on the ground that wife had failed to challenge the court’s award of fees under section 271 in her opening brief, thus waiving any challenge to the fee award on that basis. (*In re Marriage of Moody* (Mar. 31, 2009) A121691 [nonpub. opn].) The opinion noted that in any event, the court’s factual findings were supported by substantial evidence and it did not abuse its discretion in awarding fees under sections 271 and 2030. (*Ibid.*) Wife did not seek review of this decision and it is now the law of the case.

After wife filed her notice of appeal in Case No. A121691, husband filed an application for an order to show cause as to why wife should not pay him \$30,500 in pendite lite attorney fees pursuant to section 2030 so he could oppose her appeal from the attorney fee order. In support of his application, husband filed a declaration stating under penalty of perjury that he had spent more than \$160,000 in attorney fees since divorce proceedings began in 2002; that he continued to pay an attorney in Massachusetts to resolve issues relating to the property settlement; that he had incurred \$19,000 in attorney fees trying to obtain entry of the final judgment, of which wife had been ordered to pay

\$10,000; that wife had sought reconsideration and filed an appeal from that order and had not yet paid him anything pursuant to that order; that he had retained Bernard Wolf, Esq. to represent him on appeal, who estimated that he would spend approximately 60 hours on the case at \$525 an hour; and that based on the foregoing, husband was seeking \$30,000 for appellate attorney fees and \$500 in appellate costs.

Husband's declaration described his and wife's current financial circumstances as follows: "I sell floor products for living. Over the last twelve months, I have earned approximately \$40,000. I recently refinanced my home again, in order to raise cash. I used part of this cash to fund the motion for enforcement of the Court's February 8, 2008 order [that wife pay \$10,000 in attorney fees] and this motion for appellate attorney[] fees and costs. As of June 2008, I had approximately \$37,000 in liquid assets. My expenses are approximately \$9,000 per month, which I pay with a combination of earnings, savings and borrowing. I am unable to withdraw further equity from my home, as I cannot manage the increased debt service. [¶] [] As of May 31, 2007, the date [wife] signed her Final Declaration of Disclosure, she held real estate with a net fair market value of \$1,125,000. She owned retirement funds with an estimated value of \$46,650, and a life insurance policy with a cash value of \$9500. [Wife]'s Income and Expense Declaration dated January 16, 2008 indicated [wife] earns \$105,000 from her employment as Vice President of Lifehouse and receives \$27,276 in net annual rental income. [¶] [] [Wife] also receives paid vacation, paid health insurance, and paid cell phone service as part of her compensation package."<sup>2</sup>

Wife opposed husband's request for fees, stating in her declaration that he was attempting to punish and intimidate her for pursuing her right to appeal; that he earns or could earn in excess of \$300,000 annually; and that he had taken extravagant trips with

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<sup>2</sup> Husband also states in his declaration that wife is receiving free legal counsel because she is represented by an attorney who is also her friend. Wife's attorney filed a declaration stating that he is charging wife \$250 an hour for his legal services, as documented by a retainer agreement. There being no showing to the contrary by husband, we credit counsel's representation.

his girlfriend, drove an expensive car and “lavishly furnished” his \$1.7 million home. Wife asserted that husband had overestimated the time it would take to oppose a relatively simple appeal and that his lawyer’s hourly fee of \$525 was excessive.

In his reply declaration, husband disputed wife’s claim that he could earn \$300,000 annually. He noted that a bank had mistakenly stated his monthly income on a loan application he had signed two years earlier (on which wife had relied to support her argument) but that the application did not reflect his actual income. “With respect to [wife]’s other comments about my income, I lease a used Infinity. . . . I did travel with my girlfriend to Alaska in 2007, to Puerto Vallarta in July 2007, and to Paris in June 2008. My girlfriend and I used air miles for all three trips, stayed in a friend’s timeshare in Puerto Vallarta. My girlfriend paid for our lodging during the Paris trip, and we shared the cost of food and incidentals.” Husband filed a corrected statement of income showing that his gross commission income through July 1, 2008 had been \$27,800.51 or \$3,971.50 per month. He also clarified in his reply papers that since the time of his original declaration, he had paid a \$10,000 retainer to appellate counsel and had only \$21,750 in liquid assets, and that he owed more than this amount in outstanding debts to his trial attorneys in California and Massachusetts and to the Marin Academy.

The trial court held a hearing on husband’s request for appellate attorney fees and a separate order to show cause in which husband sought to enforce the court’s earlier \$10,000 fee award, which was the subject of wife’s appeal and apparently had not yet been paid by wife. Counsel for wife emphasized that under *In re Marriage of Keech* (1999) 75 Cal.App.4th 860 (*Keech*), a court must consider more than the parties’ respective incomes when fashioning a need-based fee award under section 2030. Counsel noted that husband had liquid assets whereas wife’s income, though greater than husband’s, was exhausted each month by her expenses. After hearing argument, the court ordered wife to pay husband the additional sum of \$15,000 for attorney fees and costs at the trial court and appellate court level, reserving jurisdiction to modify the award as necessary. The court noted, “As far as the issue of the need and ability to pay . . . , we heard a lot about [wife’s] income, which by all accounts is over twice as

much as [husband's], and also we know from reading the court file that [wife] has a net worth well into the seven figures. There is an ability to pay, there is need."

## II. DISCUSSION

Wife argues that the trial court erred in awarding husband \$15,000 in attorney fees and costs under section 2030 because the record shows that he has liquid assets while she is living from paycheck to paycheck and "is barely making it." She also claims that the amount of fees is unreasonable relative to the complexity of the appeal for which the fees were awarded and that the order violated her constitutional rights of equal protection and due process of law, as well as her first amendment right to petition for redress of grievances. We disagree.

A trial court has considerable discretion when fashioning a need-based fee award under section 2030. (*Keech, supra*, 75 Cal.App.4th at p. 866.) Its order will be reversed on appeal "only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made." (*Ibid.*)

Section 2030, subdivision (a)(1) provides, "In a proceeding for dissolution of marriage . . . the court shall ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party. . . to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding." Under section 2030, subdivision (a)(2), an award of need-based attorney fees requires the court to consider "(A) the respective incomes and needs of the parties, and (B) any factors affecting the parties' respective abilities to pay."

The court may make an award of fees under section 2030 only when "the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient

financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320 [enumerating the circumstances to be considered when ordering spousal support]. The fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (§ 2032, subd. (b).)

The purpose of a need-based pendent lite fee award is not the redistribution of money between the parties, but the achievement of parity in the legal proceedings, so that both sides can retain counsel. (*Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 251-252 (*Alan S.*)). Such an award "should be the product of a nuanced process in which the trial court should try to get the 'big picture' of the case. . . ." (*Id.* at p. 254.)

In support of his motion for the pendent lite fees, husband filed declarations reporting an average monthly income of \$3333 and claimed monthly expenses of almost \$9,000. He had \$21,750 in liquid assets, having recently paid a \$10,000 retainer to his appellate counsel, and he owed approximately \$20,000 to his trial counsel in California and Massachusetts. Husband explained that he was able to sustain himself in the face of this disparity between income and expenses by living off the equity in his real property. An income and expense declaration filed in support of the companion motion to enforce the earlier award of \$10,000 in attorney fees and costs reflects that husband's real and personal property were valued at approximately \$850,000, that his monthly mortgage payment on his real property was \$2,917, that the monthly taxes on the property were \$1,200, and that with other costs of living, his monthly expenses totaled \$8,938.

Wife filed an income and expense declaration in July 2008 in response to husband's motion for pendent lite fees and costs. It showed that she earned a gross salary of approximately \$8,755 each month plus rental property income of \$2,500, but that her

itemized expenses were approximately \$11,000. She had \$258 in her checking account and estimated the value of her real property and other assets to total \$834,721.

While wife has accused husband of concealing income based on the lifestyle he has maintained, the trial court implicitly credited husband's declarations to the contrary when it concluded he was entitled to need-based fees. "When evidence presented below is conflicting, an appellate court must presume that ' ' ' 'the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive.' ' ' ' ' (Stafford v. Mach (1998) 64 Cal.App.4th 1174, 1182.) The question in this appeal is whether, based on this evidence, any judge "could reasonably make [the attorney fee] order made." (Keech, supra, 75 Cal.App.4th at p. 866.) The answer to this question is "yes."

Husband and wife both have equity in real estate and comparable monthly expenses, but wife makes almost three times what husband earns when her rental income is included. Although an award of need-based fees should not be based on a simple calculation as to "which party has the higher nominal income relative to the other" (Alan S., supra, 172 Cal.App.4th at p. 254), husband's financial situation is precarious because his commission-based salary has dropped because of the state of the economy,<sup>3</sup> requiring him to live on the equity in his real property at a time when he is apparently no longer able to refinance. By contrast, wife's income is approximately the same as her expenses and she appears to have a stable position with a relatively high salary. Even if we assume that wife is spending almost all of what she makes on her expenses, including attorney fees, her future prospects are much brighter than husband's and she has not shown she could not access some of the equity in her property if necessary. It was reasonable for the trial court to conclude that she would be able to pay a fee award of \$15,000 and that husband would otherwise be unable to defend against the appeal.

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<sup>3</sup> Husband states in his reply declaration, "Because of the state of the economy, my business revenues have declined (people are not buying flooring products) and my income is actually about \$3,000 year to date."

The case law cited by wife does not require a different result. In *Keech*, a pendente lite fee award required the husband to pay wife's attorney fees at \$500 per month, which left him \$593 a month to pay all of life's other expenses after all of his support payments, taxes and rent had been deducted from his gross salary of \$5,405. This meant, effectively, that husband had no money to hire his own attorney, eliminating the parity that is the very purpose of section 2030. (See *Keech, supra*, 75 Cal.App.4th at pp. 867-868.) In *Alan S.*, the court reversed an order requiring the husband to pay \$9,000 of wife's attorney fees where the husband had a negative cash flow of about \$800 a month, having incurred large credit card balances to pay his attorney, and the court failed to consider a host of relevant factors such as the respective equity of the two parties in their homes, the income of each party's new spouse or cohabitant, husband's child support payments and his exhaustion of his liquid assets. (*Alan S., supra*, 172 Cal.App.4th at pp. 241-243, 251-254.) In this case, wife is meeting her monthly expenses and has equity in real property.

Nor has wife demonstrated that the court abused its discretion in setting the amount of the award. The appellate attorney ultimately retained by husband submitted a declaration explaining that he anticipated it would take about 60 hours to represent husband in the appeal at a rate of \$525 per hour. Additionally, husband declared that he owed his trial attorneys about \$20,000. Factoring in the \$10,000 previously awarded to husband (but apparently not yet paid by wife) an award of \$15,000 would allow husband to pay his outstanding legal fees and leave about \$5,000 for the current appeal. Or, viewed another way, it would give husband about half of the amount of the appellate fees that counsel anticipated he would incur. While we agree with wife that the issues in the prior appeal were not particularly complex and may not have warranted an award of fees at a rate of \$525 per hour, the court's order effectively cut that rate in half, to about the same rate charged by wife's counsel (\$250 per hour).

We also reject wife's claim that the fee award under section 2030 violated the parties' settlement agreement, which called for both husband and wife to pay their own attorney fees and costs through the entry of judgment. The fees and costs on appeal are a



post-judgment matter and are not covered by the express terms of the settlement agreement. Moreover, the provision cannot be reasonably construed to include a waiver of need-based trial court fees under section 2030 when such fees were incurred during an unexpectedly protracted attempt to finalize a written judgment and the motion for reconsideration that followed.

Wife contends the fee award infringed upon her constitutional rights of equal protection and due process and to petition the courts because it stifled her ability to pursue a meritorious appeal of the earlier \$10,000 fee award. She reasons that the \$15,000 fee award to husband put her in a lose-lose situation because even if she had won her appeal, she would have had to pay more than the amount she would have saved. Another way of viewing the situation is that absent the award of need-based fees, husband would have been required to pay more than \$10,000 in appellate attorney fees to protect his right to that award, effectively compelling him to allow the appeal to go unopposed to avoid an absurd financial outcome. Both sides of this coin reflect an unfortunate reality in family law—that litigation costs do not fit comfortably within the budgets of most middle class people. Wife was entitled to file her appeal; husband was entitled to oppose it; and the court was required to consider whether the financial burdens of this aspect of the litigation should be shifted to husband based on the disparity in their income and other relevant factors. Wife was in fact represented by counsel in her appeal and was not denied any constitutional right pertaining to her access to the courts.

### *III. DISPOSITION*

The judgment (order awarding attorney fees) is affirmed. The parties shall bear their own costs on appeal.

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NEEDHAM, J.

We concur.

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JONES, P. J.

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BRUINIERS, J.\*

\* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.